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## IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner below/Appellee,

v.

KATHERINE HOOVER, M.D.,

Respondent below/Appellant.

Civil Action No. 08-AAA-5  
Chief Judge Michael ThornsburyFILED  
CIRCUIT COURT  
MINGO COUNTY  
2009 DEC 16 P 3:07  
ADMINISTRATIVE  
SERIALS  
MINGO COUNTY**FINAL ORDER AFFIRMING THE WEST VIRGINIA BOARD OF MEDICINE**

This matter came before the Court pursuant to the Appellant, Katherine Hoover's, Petition for Appeal from the Final Order of the West Virginia Board of Medicine. The parties appeared as follows the Appellant, Katherine Hoover, M.D., appeared in person and by counsel, C. Christopher Younger and C. Page Hamrick; and the Appellee, the West Virginia Board of Medicine, through counsel, Debra L. Hamilton. The Court has considered the instant Petition, all responses, and the relevant legal authorities in this matter and hereby **AFFIRMS** the Board of Medicine Order based upon the following Findings of Fact and Conclusions of Law, to-wit:

**Findings of Fact**

1. This Appeal stems from a Complaint Questionnaire filed by Karen VanHorn on October 27, 1995, on behalf of her then minor child, Sarah Hess-Sphon, alleging that the Appellant engaged in inappropriate conduct, on October 13, 1995, at the Myers Clinic, in Philippi, West Virginia.
2. The Complaint Committee of the Board then investigated the complaint and found probable cause to substantiate the charges against the Petitioner pursuant to W.Va. Code § 30-3-14 on April 28, 1996. On May 6, 1996, the Committee's finding of probable

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- cause was reported to and approved by the Board of Medicine. At that time the Board of Medicine issued the first Complaint and Notice of Hearing on May 13, 1996.
3. On July 26, 2001, an evidentiary hearing was held before an Independent Hearing Examiner. Dr. Hoover appeared briefly at the hearing without counsel, gave an opening statement, then left the proceeding after advising the hearing examiner that she had to go to work and would not participate in the proceedings. Hoover v. West Virginia Bd. of Medicine, 216 W.Va. 23, 24, 602 S.E.2d 466, 468 (2004). From May 13, 1996 through July 26, 2001, it appears the proceedings before the Board of Medicine were delayed as a result of Dr. Hoover filing several writs of prohibition and related appeals.
  4. On October 26, 2001, the Hearing Examiner submitted proposed findings of fact and conclusions of law to the Board of Medicine and recommended that Dr. Hoover's medical license be revoked, or in the alternative, that she be placed on probation for a period of five (5) years. On November 9, 2001, the Board of Medicine entered an Order placing Dr. Hoover on probation for a period of five (5) years for the conduct described in the original Complaint.
  5. On November 9, 2001, Dr. Hoover filed a Petition for Judicial Review in the Circuit Court of Harrison County, asserting several assignments of error regarding the proceedings before the Board of Medicine. On March 14, 2002, Dr. Hoover filed a memorandum of law in support of her Petition for Judicial Review. On March 14, 2002, the Board of Medicine filed a Response to this Motion.
  6. On December 18, 2002, Judge Matish entered an Order reversing the Board of Medicine's Order because the President and Secretary of the Board of Medicine had not personally signed the Complaint. The Board of Medicine appealed Judge Matish's Order

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to the West Virginia Supreme Court of Appeals (Supreme Court of Appeals) and on May 24, 2004, the Supreme Court of Appeals affirmed Judge Matish's Order, but reversed insofar as Judge Matish failed to provide the Board of Medicine with an opportunity to correct the signature defect. See Hoover, 602 S.E.2d 466. In this Order the Supreme Court of Appeals also ordered a new evidentiary hearing before a different Hearing Examiner. Id.

7. On September 13, 2004, the Board of Medicine voted to "reprosecute the case" against Dr. Hoover. On November 14, 2004, the Board of Medicine issued an amended Complaint and Notice of hearing and scheduled another evidentiary hearing before a new Hearing Examiner. On May 20, 2005, Dr. Hoover filed a Petition with the Kanawha County Circuit Court asserting the same or similar arguments as she presented in the Circuit Court of Harrison County. The Circuit Court of Kanawha County then issued an Order on February 22, 2007 denying Dr. Hoover's Petition for Writ of Prohibition and allowing the Board of Medicine to proceed with an evidentiary hearing based upon the Amended Complaint. Thereafter, Dr. Hoover filed a Petition to Stay the Order entered by the Kanawha County Circuit Court on February 22, 2007, which the Supreme Court of Appeals denied.
8. On September 11, 2008, the Board issued an Order, effective on October 8, 2008, revoking Dr. Hoover's license to practice medicine, stayed the revocation of her license, and placed Dr. Hoover on probation while requiring her to practice under the supervision of another licensed physician during the probation period. Additionally, the Order required Dr. Hoover to pay a \$1,000.00 fine and also required Dr. Hoover to pay administrative costs in the amount of \$27,430.07.

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9. The order adopted by the Board indicated that various changes were being made to the findings of fact in the proposed order.

¶ 7. In Finding of Fact No. 18, the first sentence is modified to read: "On September 6, 2001, a message was left on the answering machine at the residence of Sarah Hess-Sphon's father in Pennsylvania stating that his daughter Sarah is going to be arrested and probably incarcerated for perjury, and that there is an investigation ongoing at the moment. In Finding of Fact No. 18, in the third sentence, the word "threatening" is not adopted and the sentence is modified, in part, to read: "and he stated in the message that Sarah is going to be arrested and probably incarcerated for perjury."

¶ 10 Finding of Fact No. 23 is modified in part to read: "with a female gynecologist because Sarah needed gynecological care."

¶ 11 In Finding of Fact No. 25, the phrase "because Sarah was always tired" is not adopted and "approximately forty-five (45) minutes" is modified to "forty-five (45) minutes to an hour."

¶ 12 Finding of Fact No. 27 is modified to read: "Karen Van Horn-Mercer testified further that Sarah believed that she was included in Dr. Hoover's invitation, and she told Sarah perhaps she had misunderstood Dr. Hoover, and she didn't want to believe this was true."

¶ 20 In Finding of Fact No. 50, the last phrase is modified to read: "the actions engaged in would violate Number 3, particularly with respect to the patient's dignity and respect."

¶ 21 The following additional Finding of Fact (No. 50.a) is made to properly reflect the opinions of Dr. John Walden and is to be inserted after Finding of Fact No. 50: "Finding of Fact No. 50.a: Dr. Walden was presented with a second modified set of hypothetical facts, which assumed that the physician asked, in a medical office setting, whether a 17 year-old's friends, rather than the patient, would have sex with her sons. He testified that that modification of the hypothetical would not change his opinion that the physician's conduct was unethical and violated the previously cited rules and statutes."

¶ 22 In Finding of Fact No. 51, the first sentence is modified to read: "Dr. Walden was then presented with a third modified set of hypothetical facts, which assumed that a 17-year-old patient, in a medical office setting, came in for treatment and was asked if she and her girlfriends would come out to the physician's house, even if it was for nothing more than friends."

¶ 23 Finding of Fact No. 52 is modified to read: "...he would not give out a book such as this under the circumstances..."

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¶ 26 Finding of Fact No. 62 is modified, in part, to read: "Despite being subject to overly aggressive cross-examination by counsel for the Respondent on portions of three days regarding the contents..."

¶ 27 Finding of Fact No. 64 is modified to read: "Peggy Jones testified that she initially checked Sarah Hess-Sphon into the office, took her into a room and had a brief conversation with her before speaking with Dr. Hoover.

**Conclusions of Law**

1. West Virginia Code § 29A-5-4(b) provides that "[p]roceedings for review shall be instituted by filing a petition, at the election of the petitioner, in either the circuit court of Kanawha County, West Virginia or in the circuit court of the county in which the petitioner or any one of the petitioners resides or does business, or with the judge thereof in vacation, within thirty days after the date upon which such party received notice of the final order or decision of the agency."
2. West Virginia Code § 29A-5-4(g) provides that:

"The Court may affirm the order or decision of the agency or remand the case for further proceedings, it shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:

  - (1) In violation of constitutional or statutory provisions; or
  - (2) In excess of the statutory authority or jurisdiction of the agency; or
  - (3) Made upon unlawful procedures; or
  - (4) Affected by other error of law; or
  - (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
  - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."
3. "The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before

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the agency, not shown in the record, testimony thereon may be taken before the court.

The court may hear oral arguments “ West Virginia Code § 29A-5-4(f).

4. In Syllabus Point 1, West Virginia Health Care Cost Review Authority v. Boone Mem'l Hosp., 196 W.Va. 326, 472 S.E.2d 411 (1996), the West Virginia Supreme Court of Appeals held that:

“ ‘Upon judicial review of a contested case under the West Virginia Administrative Procedure[s] Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are “(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” ’ Syl. Pt. 2, Shepherdstown Volunteer Fire Department v. Human Rights Comm'n, 172 W.Va. 627, 309 S.E.2d 342 (1983).” Syllabus Point 1, St. Mary's Hospital v. State Health Planning and Development Agency, 178 W.Va. 792, 364 S.E.2d 805 (1987).

5. The task of the Court is to determine “whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Frymer-Halloran v. Paige, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995)(quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).
6. The Appellant, Dr. Hoover, asserts that laches should apply in this matter as the alleged events occurred over twelve (12) years prior to the final decision of the Board of Medicine and the delay resulted from the Board’s misconduct on various occasions over those preceding years.

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7. "The elements of laches consists of (1) unreasonable delay and (2) prejudice." Province v. Province, 196 W.Va. 473, 483, 473 S.E.2d 894, 904 (1996).
8. "Laches is an equitable defense, and its application depends upon the particular facts of each case. There are some general principles, however, which a court should be mindful of when determining whether the doctrine of laches is applicable. For instance, "[m]ere delay will not bar relief in equity on the ground of laches. 'Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.'" State ex rel. West Virginia Dept. of Health and Human Resources, Child Advocate Office, on Behalf of Jason Gavin S. by Diann E.S. v. Carl Lee H., 196 W.Va. 369, 374, 472 S.E.2d 815, 820 (1996).
9. In State ex rel. Webb v. West Virginia Bd. of Medicine, 203 W.Va. 234, 506 S.E.2d 830 (1998), the West Virginia Supreme Court of Appeals discussed the application of laches in cases involving physician discipline proceedings before the Board of Medicine, holding that:

"[I]t is important to recognize that physician discipline proceedings are not the sort of traditional, common-law adversarial civil proceedings in which doctrines like laches evolved, to balance the rights and interests of purely private parties. In a physician discipline proceeding, the interests of the state, the general public and the medical profession are the primary concern.

Thus, there may be circumstances in a physician discipline proceeding when even a substantial degree of prejudice to a physician that is caused by an unreasonable delay not of the physician's making might nevertheless be outweighed by the strong interests of the state, the public and the profession in fully addressing allegations of serious professional misconduct-so as to tip the equitable balance in favor of continuing with a proceeding." 506 S.E.2d at 837.

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10. The Supreme Court of Appeals further noted in Webb that “in applying the doctrine of laches in such proceedings, the interests of the state, the public and the medical profession must be given substantial consideration, and the doctrine should be applied narrowly and conservatively and in such a fashion as to not unfairly impair the Board’s duty and responsibility to supervise and regulate the medical profession for the protection of the profession and the public.” Id., 506 S.E.2d at 833-34.
11. In Footnote 3, Webb, the Supreme Court of Appeals further noted that “In Board of Medicine proceedings, there are at least two junctures where we perceive that laches may be applicable: (1) when there is an issue of the timeliness of the making of a complaint to the Board; and (2) where there is an issue of the timeliness of actions taken by the Board.” Id.
12. The investigation before the Board of Medicine has been pending since 1996, with various motions in the circuit courts of this state and on appeal to the West Virginia Supreme Court of Appeals.
13. Dr. Hoover’s case is distinguishable from Webb where there was a substantial delay in bringing an investigation before the Board of Medicine.
14. In Fact, Dr. Hoover has appealed this matter to the West Virginia Supreme Court of Appeals on several occasions.<sup>1</sup>
15. The Court **FINDS** that the doctrine of laches is not applicable in the instant appeal and the decision of the Board of Medicine was proper under the circumstances.

<sup>1</sup> See State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996); State ex rel. Katherine Anne Hoover, M.D. v. Honorable Robert K. Smith, Special Judge of Circuit Court of Kanawha County, West Virginia Board of Medicine, Ad Anne Werum Lambright, 1996 WL 717914, W.Va. December 13, 1996; State ex rel. Hoover v. Smith, 198 W.Va. 507, 482 S.E.2d 124 (1997); and Hoover v. West Virginia Bd. of Medicine, 216 W.Va. 23, 602 S.E.2d 466 (2004).



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16. Second, Dr. Hoover asserts that the Board of Medicine failed to meet its burden of proof by clear and convincing evidence.
17. “[F]indings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law.” Modi v. West Virginia Bd. of Medicine, 195 W.Va. 230, 465 S.E.2d 230 (1995).
18. “The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syllabus Point 2, In re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996).
19. “The scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner.” Martin, 465 S.E.2d at 406.
20. In Webb the West Virginia Supreme Court of Appeals noted that disciplinary actions against a physician “must be predicated upon clear and convincing proof.” 569 S.E.2d at 231.
21. “A reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not second guess such determinations.” Michael D.C. v. Wanda L.C., 201 W.Va. 381, 387, 497 S.E.2d 531, 537 (1997).  
“[F]indings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference. Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by

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substantial evidence should not be disturbed on appeal." Modi, 465 S.E.2d at 239

(internal citations omitted).

22. Dr. Hoover asserts that the witnesses for the Board of Medicine were not credible and that the hearing examiner unreasonably relied on their testimony in reaching his decision.
23. Dr. Hoover also asserts that the Board of Medicine as part of its final order required her to pay \$27,430.07 in administrative costs for the Administrative Proceedings.
24. West Virginia Code of State Rules § 11-1A-12.3 provides that:

"When the Board finds that any applicant is unqualified to be granted a license or finds that any licensee should be disciplined pursuant to the West Virginia Medical Practice Act or rules of the Board, the Board may take any one or more of the following actions:

- a. Refuse to grant a license to an applicant;
- b. Administer a public reprimand;
- c. Suspend, limit or restrict any license for a definite period, not to exceed five (5) years;
- d. Require any licensee to participate in a program of education prescribed by the Board;
- e. Revoke any license;
- f. Require the licensee to submit to care, counseling or treatment by physicians or other professional persons;
- g. Assess a civil fine between \$1,000 and 10,000 and/or assess cost of the Board's investigation and administrative proceedings against the licensee;
- h. Require him or her to practice under the direction or supervision of another practitioner or
- i. Require the licensee to provide a period of free public or charitable service.

In addition to and in conjunction with these actions, the Board may make a finding adverse to the licensee or applicant, but withhold imposition of judgment and penalty, or it may impose the judgment and penalty but suspend enforcement of the penalty and place the physician or podiatrist on probation. Probation may be vacated upon noncompliance with such reasonable terms as the Board may impose. In its discretion, the Board may restore and reissue a license to practice medicine or podiatry issued under the West Virginia Medical Practice Act or any antecedent law, and as a condition thereof, it may impose any disciplinary or corrective measure provided for in this Rule or in the West Virginia Medical Practice Act.

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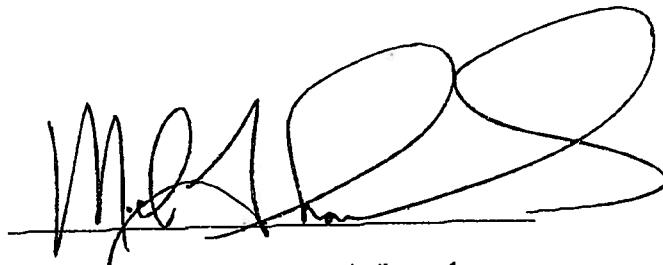
25. The Court **FINDS** that W.Va. C.S.R. § 11-1A-12.3(g) allows the Board to assess a civil fine and/or assess the costs of the Board's investigation and administrative proceedings against the licensee.
26. The Court **FINDS** that any one of three combinations may be imposed by the Board allowing for some discretion by the Board and limiting the ability of the licensee to ascertain what the potential penalty is going to be.
27. The court **FINDS** that the West Virginia Board of Medicine properly found that Dr. Hoover should pay a fine and imposed applicable attorney's fees in her case.
28. The Court **FINDS** that the statute in question contemplates the ability of the Board of Medicine to impose a fine and costs, which were properly imposed in this case.
29. Therefore, the Court **AFFIRMS** this matter to the Board for determination of whether it wishes to impose the civil penalty or the costs of investigation and administrative proceedings in the instant case.

**Judgment**

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law the Court hereby **AFFIRMS** the West Virginia Board of Medicine Order.

The Clerk is **DIRECTED** to send attested copies of this Order to all parties of record.

**ENTERED** this the 16<sup>th</sup> day December 2009.



The Honorable Michael Thomsbury  
Chief Judge, 30th Judicial Circuit